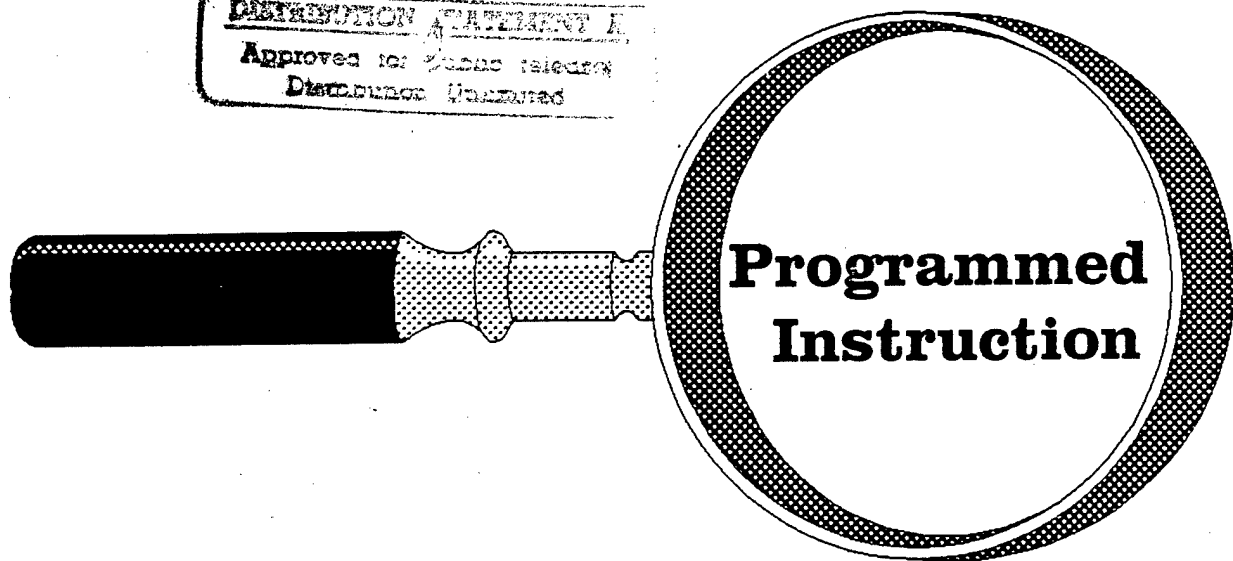


AR 15-6 INVESTIGATIONS

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The Judge Advocate General's School
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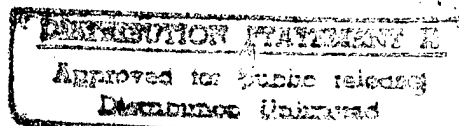
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PREFACE

This programmed instructional text was developed to provide basic information to the student concerning investigations and boards of officers. Completion of the text will provide the student with a foundation that will assist him in understanding the classroom instruction on Military Personnel Law.

For many of you, some of the terms used in this text will be unfamiliar. Some of these terms, for example, "counsel for consultation," will be explained in this text. Other terms, for example, "Special Court-Martial Convening Authority," are primarily Criminal Law terms that will be explained more fully during your Criminal Law instruction. As you work through this programmed instruction, please note terms and concepts that are confusing or unfamiliar to you. Your Military Personnel Law instructor will be available to answer your questions. As a Basic Class graduate, you will be involved in investigations soon after arriving at your new duty station. Please do not hesitate to ask questions.

Gender: Masculine gender pronouns used in this text are intended to include both male and female personnel, except where clearly inapplicable.

NOT USED

INTRODUCTION

This is a programmed instructional text on Army regulatory investigations and boards of officers. It will aid you as a judge advocate in performing duties as counsel before Army administrative boards and in reviewing Army administrative board proceedings. At the conclusion of this text, you will:

1. Understand the functions of and general procedures used by investigations and boards of officers.
2. Understand the regulatory provisions pertaining to boards of officers conducting investigations.
3. Understand your responsibilities as counsel in AR 15-6 investigations.
4. Be able to perform administrative reviews of investigations and boards of officers to ensure they have been conducted properly.

This text will present small blocks of instruction for you to read and then pose questions for you to answer. You should answer each question and then check it against the given answer. If you did not answer a question correctly, restudy the material until you understand why the answer was improper. Answering the questions is important because it reinforces your understanding of the material.

Under each heading in the text, you will find references to the source material for the information in that particular portion of the text. For example, under Section A are the references-- "(AR 15-6, Chapters 1 and 2)." This means that in Chapters 1 and 2 of Army Regulation 15-6 you will find material supporting that part of the text.

INVESTIGATIONS AND BOARDS OF OFFICERS

General. Boards of officers may be categorized by the authority for their appointment as statutory or regulatory boards.

1. Statutory Boards. A statutory board is one that is either directed or authorized by Congress to perform special functions in the military administrative process. The statutory authority for these boards can be found in the United States Code; and the specific powers, jurisdiction, and procedures are in the statutes or in the Army regulations that implement the statutes. Examples of statutory boards are the Army Disability Review Board, the Army Board for Correction of Military Records (ABCMR), and the Army Discharge Review Board.

2. Regulatory Boards. A regulatory board is one that is authorized by a regulation promulgated by the Secretary of the Army. An example of such a regulation is AR 635-200, which authorizes boards to recommend the administrative separation of enlisted personnel from the Army prior to their normal discharge date. While the general authority of the Secretary of the Army to separate enlisted personnel is granted by statute [10 U.S.C. §1169 (1988)], the use of a board in the separation process is neither directed nor specifically authorized by the statute. Such boards are strictly creatures of Army regulation.

This text will consider only regulatory boards.

ANSWER THE FOLLOWING QUESTION:

List the two types of boards used in the Army and the authority for their appointment:

a.

b.

ANSWER:

- a. Statutory boards are directed or authorized by Congress to perform special functions in the military administrative process.
- b. Regulatory boards are authorized by regulation of the Secretary of the Army.

**SECTION A: REGULATORY BOARDS
(AR 15-6, paras. 1-1 and 1-8e)**

Part 1. Governing Regulations

Army Regulation 15-6 (Procedure for Investigating Officers and Boards of Officers) contains the basic rules for Army regulatory boards. Many boards, however, are appointed under a specific regulation or directive (e.g., AR 635-200 provides for the appointment of boards to consider the separation of enlisted personnel). In that case, the provisions of the specific regulation or directive will control the proceedings. Often, that specific regulation will have a provision that makes AR 15-6 applicable to the proceedings. Consequently, you may have to look to both the specific regulation involved and to AR 15-6 for the proper board procedures. If the two regulations conflict on a particular point, the provisions of the specific regulation authorizing the board will override the provisions of AR 15-6.

As stated, AR 15-6 establishes the procedures for investigations and boards of officers not specifically authorized by any other directive.

ANSWER THE FOLLOWING QUESTIONS:

AR 15-6, paragraph 5-5, states that the recorder will, at a reasonable time in advance of the first session of a board, provide the respondent with a copy of all unclassified documents in the case file and a memorandum of notification. The regulation further defines a reasonable time as 5 working days. AR 635-200 provides that AR 15-6 is applicable to administrative separation hearings and further provides that a respondent will be notified at least 15 days before the administrative separation proceeding.

Private John Doe is being considered for separation under AR 635-200 and will be appearing before a board of officers.

1. He is entitled to how many days' notice?
 - a. At least 5 days.
 - b. At least 15 days.
2. Why?

ANSWERS:

1. b.
2. Private Doe is entitled to 15 days' advance notice because the provisions of the specific regulation, AR 635-200, override the provisions of AR 15-6.

Part 2. Types of Investigations and Boards

(AR 15-6, paras. 1-4, 1-5, 1-8, 2-1, 4-1, 4-2, and Chapter 5)

General.

1. **Function and Purpose.** The primary purpose of an investigation or board of officers is to look into and report on the matters that the appointing authority has designated for inquiry. The report will include findings of fact and recommendations. Often, when criminal misconduct is suspected, it may be more appropriate to conduct an R.C.M. 303 commander's inquiry or to have either the military police or Criminal Investigation Division conduct the investigation.

2. **Methods.** An administrative fact-finding procedure under AR 15-6 may be designated an investigation or a board of officers. The proceedings may be informal or formal. Proceedings that involve a single officer using the informal procedures are designated investigations. Proceedings that involve more than one investigating officer using formal or informal procedures or a single investigating officer using formal procedures are designated boards of officers.

3. **Uses.** AR 15-6 does not require that an investigation be conducted before taking adverse administrative action. But, if inquiry is made under AR 15-6, the findings and recommendations may be used in any administrative action against an individual. An adverse administrative action does not include actions taken

pursuant to the Uniform Code of Military Justice (UCMJ) or the Manual for Courts-Martial (MCM).

Informal Procedures. An informal investigation or board may use whatever method it finds most efficient and effective for acquiring information. For example, the board may divide witnesses, issues, or evidentiary aspects of the inquiry among its members for individual investigation and development, holding no collective meeting until ready to review all the information collected. Also, evidence may be taken telephonically, by mail, or in whatever way the board deems appropriate. A respondent shall not be designated when informal procedures are used and no one is entitled to the rights of a respondent.

Formal Procedures. The board will meet in full session to take evidence. Definite rules of procedure will govern the proceedings. Depending on the subject matter under investigation, these procedural rules will be found in AR 15-6, the specific regulation governing the investigation, or both. If a respondent is designated, formal procedures must be used. For example, a board of officers considering an enlisted soldier for separation under AR 635-200 must use formal procedures. When a respondent is designated, a hearing must be held.

The appointing authority must determine, based on the seriousness and complexity of the issues and the purpose of the inquiry, whether to designate an investigation or a board of officers to conduct the inquiry.

1. Investigation. Conducted by a single investigating officer using informal procedures. An investigation would be appropriate for relatively simple matters. It could also be useful in a serious matter to conduct a preliminary inquiry to be followed by a formal proceeding.

2. Board. When more than one fact-finder is appointed, whether formal or informal procedures are used, they will be designated a board of officers. Additionally, a single fact-

finder will be designated a board when formal procedures are to be used.

ANSWER THE FOLLOWING QUESTIONS:

1. True/False. An administrative board can be directed to investigate any matter of interest to the appointing authority.

2. Three officers have been appointed by the Commander, Fort Hood, to examine overall security on the post. No respondent has been designated.

This investigative body is called a _____ and may use _____ procedures.

3. COL Jones, the post comptroller, has been appointed to investigate allegations of mismanagement of funds by the manager of the officers' club, LT White, who has been designated the respondent.

COL Jones is called a _____ and must use _____ procedures. He will afford LT White a _____.

4. In each of the above cases, the investigative body will be required to find _____ and make _____ to the appointing authority.

ANSWERS:

1. True. An administrative board can be appointed to investigate any matter of concern to the appointing authority. When criminal misconduct is suspected, however, it may be more appropriate to have the investigation conducted by either the MP's or C.I.D., or to conduct an R.C.M. 303 commander's inquiry.
2. This investigative body is called a board of officers and may use informal procedures.
3. COL Jones is called a board and must use formal procedures. He will afford LT White a hearing. When a respondent is designated, only formal procedures may be used. Even when there is only one investigator, he is designated a board when formal procedures are used.
4. In each of the above cases, the investigative body will be required to find facts and make recommendations to the appointing authority.

Part 3. Authority to Appoint a Regulatory Board
(AR 15-6, Chapter 2)

Formal. After consultation with the servicing judge advocate or legal advisor, the following may appoint a formal board:

1. Any general court-martial convening authority (GCMCA) or special court-martial convening authority (SPCMCA), including those who exercise that authority for administrative purposes only;
2. Any general officer;
3. Any commander or principal staff officer in the grade of colonel or above at the installation, activity, or unit level;

4. Any State adjutant general; or

5. Any DA civilian supervisor permanently assigned to a position graded as GS/GM-14 or above and who is assigned as the head of an Army agency or activity or as a division or department chief.

Informal investigation or board may be appointed by:

1. Anyone authorized to appoint a formal one.

2. A commander at any level.

3. A principal staff officer or supervisor in the grade of major or above.

Delegation: If the appointing authority is a general officer, he may delegate selection of board members to members of his staff.

Limitation: Only a GCMCA may appoint for incidents resulting in property damage of \$1,000,000 or more, or in the loss or destruction of an Army aircraft or missile, or in an injury and/or illness resulting in or likely to result in death or permanent total disability.

ANSWER THE FOLLOWING QUESTIONS:

1. True/False. A formal investigation may be appointed by a principal staff officer or supervisor in the grade of major or above.
2. True/False. A GCMCA may appoint either a formal or an informal investigation or board of officers and, if the GCMCA is a general officer, may delegate the selection of board members to the adjutant general or to the G-1.

ANSWERS:

1. False. Principal staff officers and supervisors in the grade of major or above have authority to appoint only informal investigations and boards.
2. True.

Part 4. Function of Investigations and Boards of Officers
(AR 15-6, para. 1-5)

The primary function of any investigation or board of officers is to ascertain facts and report them to the appointing authority. It is the duty of the investigating officer or board to ascertain and consider the evidence on all sides of each issue thoroughly and impartially and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority.

Part 5. Method of Appointment
(AR 15-6, para. 2-1b)

Informal investigations and boards may be appointed either orally or in writing. Formal boards will be appointed in writing but, when necessary, may be appointed orally and later confirmed in writing. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation or board and the nature of the findings and recommendations required. The governing regulation should be specified and any special instructions should be detailed.

If the board or investigation is appointed in writing, a Memorandum of Appointment will be used. AR 15-6, Figures 2-1, 2-3,

2-4, and 2-5, contains examples of various Memoranda of Appointment. Review those figures and note that the Memorandum of Appointment must include certain information--the specific regulation or directive under which the board is appointed, such as AR 635-200; the purpose of the board; the scope of the board's investigatory power; and the nature of the findings and recommendations required. The scope of the board's power is very important because a board has no power beyond that vested in it by the appointing authority. A deficiency in the memorandum may nullify the proceedings for lack of jurisdiction. If this occurs, AR 15-6, para. 2-3, should be consulted. It may be possible for the appointing authority to ratify the board's action.

The memorandum also names the parties to and designates their roles in the board proceeding. A board may be appointed as a "standing board" (one that will hear all cases within its investigatory scope over a period of time); therefore, no respondent is named. If a board is appointed specifically to investigate one or more known respondents, the respondent(s) would also be named in the Memorandum of Appointment.

ANSWER THE FOLLOWING QUESTIONS:

1. Informal and formal investigations and boards may be appointed _____ or in _____.
2. The appointment should specify the _____ and _____ of the investigation or board and the nature of the _____ and _____ required.
3. MAJ Smith has been appointed to investigate allegations of trainee abuse against SGT Thomas, the respondent. The appointment was made orally by the proper authority. To constitute a valid board, the appointment must be _____.
4. The Memorandum of Appointment to a board must inform the board of the nature of _____ and _____ required in the report of proceedings.

ANSWERS:

1. Formal and informal investigations and boards may be appointed orally or in writing.
2. The appointment should specify the purpose and scope of the investigation or board and the nature of the findings and recommendations required.
3. MAJ Smith has been appointed to investigate allegations of trainee abuse against SGT Thomas, the respondent. The appointment was made orally by the proper authority. To constitute a valid board, the appointment must be later confirmed in writing.
4. The Memorandum of Appointment to a board must inform the board of the nature of findings and recommendations required in the report of proceedings.

Part 6. Board Membership

(AR 15-6, paras. 2-1c, 5-1, 5-2, 5-3; AR 635-200, para. 2-7)

The appointing authority will personally appoint the members of a board, except that appointing authorities who are general officers may delegate the selection of board members to members of their staff. Investigating officers and board members will be chosen as those best qualified for the duty by reason of their education, training, experience, length of service, and temperament.

Only commissioned or warrant officers or DA civilian employees permanently assigned to a GS-13 position will be appointed as investigating officers or voting members of boards of officers, unless the specific directive under which the appointment is made provides otherwise or unless the member is appointed as a "member with special technical knowledge" (discussed below). AR 635-200, para. 2-7 (which is a "specific directive" under which appointments may be made), authorizes the

appointment of noncommissioned officers in the grade of sergeant first class (E-7) and above, provided that the noncommissioned officer is senior to the respondent. Under AR 635-200, a majority of the members must be commissioned or warrant officers and the president must be a major or above.

The investigating officer or voting member of a board appointed to examine a soldier's conduct or performance of duty, or to make findings or recommendations that may be adverse to a soldier, will be senior in rank to that soldier, except where the appointing authority determines that it is impracticable because of military exigencies. The various types of board members and their responsibilities are discussed below.

1. President. The senior voting member of the board acts as president. The senior voting member appointed will be at least a major, except when the appointing authority determines that such appointment is impracticable due to military exigencies. The president controls all administrative aspects of the board. Also, unless a legal advisor has been appointed to the board, the president will rule on evidentiary and procedural matters and on challenges to any other board member. His rulings on evidentiary and procedural matters may be reversed by a majority vote of the voting members present.

2. Members. Persons specifically appointed to hear a case and to vote upon findings and recommendations are considered members of the board. All members of a formal board of officers are voting members unless designated otherwise by AR 15-6, the governing regulation, or the Memorandum of Appointment.

3. Recorder. The Memorandum of Appointment may designate a commissioned or warrant officer as recorder. His duties are similar to those of a prosecutor in a criminal trial, and he does not have a vote. If no recorder is designated in the appointing memorandum, the junior member of the board acts as recorder and he retains his vote on the proceedings.

4. Legal Advisor. A legal advisor is a nonvoting member of the board. Unless the specific directive under which the board is appointed requires a legal advisor, a judge advocate or civilian

attorney who is a member of the judge advocate legal service may be appointed legal advisor under the following circumstances only:

a. The Judge Advocate General authorizes the appointment;

b. The general court-martial convening authority (GCMCA) directs the appointment; or

c. An other than GCMCA who has a judge advocate assigned to his organization or a subunit thereof under an applicable Table of Organization and Equipment or Table of Distribution and Allowances authorizes the appointment.

The legal advisor will rule finally on challenges for cause against board members (except a challenge against the legal advisor) and on all evidentiary and procedural matters. The legal advisor may not dismiss any question or issue before the board.

5. Members With Special Technical Knowledge. Persons with special technical knowledge may be appointed as voting members or, unless there is a respondent, as advisory members without vote. Appointment may be appropriate where their expertise is needed to clarify technical and complex points. They need not be commissioned or warrant officers.

Once a member is appointed to the board, attendance at board sessions takes precedence over all other duties unless he is excused in advance by the appointing authority. In order to have a legally constituted board, however, a majority of the appointed voting members of the board must be present. This is called the quorum requirement.

When members are absent or challenged for cause, the board is still legally constituted as long as a quorum is present. If less than a quorum is present, the board is not properly constituted. To anticipate this problem, the Memorandum of Appointment may designate several "alternate members." The appointing memorandum should specify that these alternate members are to be called in the sequence listed if necessary to constitute a quorum in the absence of a regular member. The president calls alternate

members without further consultation with the appointing authority. A member added thereby becomes a regular member with the same obligation to be present at all further proceedings of the board.

In addition to the quorum requirement, some regulations require that a certain minimum number of members be present to have a lawfully constituted board. For example, AR 635-200 requires at least three members for a board considering an enlisted soldier for separation. When a minimum number of members are required, both the quorum rule and the minimum number requirement must be fulfilled.

ANSWER THE FOLLOWING QUESTIONS:

1. True/False. AR 15-6 requires that investigating officers and voting members of boards be commissioned or warrant officers.
2. True/False. An investigating officer or voting member of the board must always be senior to the individual being investigated.

For Questions 3 and 4, assume that the Memorandum of Appointment designates one board president (a major), four members (captains), two alternate members (captains), and a nonvoting recorder (a captain). Which of the following boards are legally constituted? If you answer "NO," also explain your reasoning.

3. No minimum number required by specific regulation. The president and two members are present. The other members are absent without excuse.

Yes _____ No _____

Why not? _____

4. No minimum number required by specific regulation. Three of the members are present. The president and the absent members have been properly excused.

Yes _____ No _____

Why not? _____

For Questions 5 and 6, assume that only three members were appointed.

5. Separation board under AR 635-200. The president and one member are present. The other members are properly excused.

Yes _____ No _____

Why not? _____

6. Separation board under AR 635-200. The president and one member are present. The other three members are absent without excuse. The president calls one alternate member to serve.

Yes _____ No _____

Why not? _____

7. True/False. The recorder in a board proceeding is never a voting member.

ANSWERS:

1. False. An investigating officer or board member can also be a civilian, GS-13. Remember that, if the appointment is made under the provisions of a specific regulation, the specific regulation controls. For example, AR 635-200 permits the appointment of noncommissioned officers in the grade of sergeant first class or above to administrative separation boards.
2. False. While the general rule is that the investigating officer or voting member of a board should be senior in grade to the individual being investigated, the appointing authority may deviate from the rule if he determines it is impracticable because of military exigencies. Be aware, however, that inconvenience in obtaining an investigating officer or the unavailability of senior persons within the appointing authority's organization is not normally considered a military exigency.
3. Yes. Three out of five members is a majority and the quorum requirement is satisfied.
4. No. The board must have a president who is a major or above.
5. No. Minimum number of three is required. Even though there is a quorum, there are not enough members.
6. Yes. The addition of the alternate member satisfies both the quorum rule and the minimum number requirement.
7. False. When a recorder is not appointed, the junior member of the board acts as the recorder and retains his vote.

Part 7. Respondent
(AR 15-6, paras. 1-7, 5-4)

General. A respondent may be designated when the appointing authority desires to provide a hearing for a person with a direct interest in the proceeding. The mere fact that an adverse finding may be made or adverse action recommended against a person, however, does not mean that he should be designated a respondent. The appointing authority decides whether to designate a person as a respondent, except when designation of a respondent is

1. Directed by authorities senior to the appointing authority; or

2. Required by other regulations (e.g., AR 635-200 separation proceedings) or directives or when procedural protections available only to a respondent under AR 15-6 are mandated by other regulations or directives.

Before Proceedings. When it is decided at the time a formal board is appointed that a person should be designated a respondent, the designation should be made in the Memorandum of Appointment.

During the Proceedings. The appointing authority may designate a respondent at any point in the proceedings. A respondent so designated will be allowed a reasonable time to obtain counsel and to prepare for subsequent sessions. The record of the proceedings to date and all evidence will be made available to the newly designated respondent and counsel. The respondent may request that witnesses who have previously testified be recalled for cross-examination.

Adverse Administrative Action. When adverse administrative action is contemplated against an individual, including an individual designated as a respondent, based upon information obtained as a result of an investigation or board conducted pursuant to AR 15-6, the following minimum due process must be provided before final action is taken against the individual:

1. Written notification of the proposed adverse action and a copy (unless previously provided) of that part of the findings and recommendations on which the proposed adverse action is based.

2. A reasonable opportunity to reply in writing and to submit relevant rebuttal material.

3. Consideration of the response submitted.

The requirement to refer the investigation to the affected individual does not apply when the adverse action contemplated is prescribed in regulations or other directives that provide procedural safeguards. For example, it would not be necessary to refer the investigation before issuing an adverse performance evaluation, because the regulations governing performance evaluations provide the necessary procedural safeguards.

ANSWER THE FOLLOWING QUESTIONS:

1. True/False. Whenever a board may result in an adverse recommendation against an individual, that person must be designated a respondent.
2. True/False. PVT Jones is being considered by a board for separation from the service. The appointing authority, in his discretion, may choose not to designate him a respondent.

ANSWERS:

1. False. The appointing authority may elect to have the board perform its function of making findings and recommendation without designating anyone a respondent. Before any adverse action can be taken against an individual as a result of the board, however, that individual must usually have the opportunity to examine the report and submit written rebuttal.
2. False. Since the board has been convened specifically to separate PVT Jones, he must be designated a respondent in order to provide the procedural protections required by AR 635-200.

Part 8. Review of Function of Parties
(AR 15-6, paras. 5-1, 5-3)

As the presiding officer, a board president calls the board into session and, when no legal advisor has been appointed, rules on challenges and objections, although some rulings are subject to objection by other members. He may specify certain administrative details, such as the uniform for a hearing. A president directs and supervises the activities of the recorder to ensure that all business of the board is properly conducted and that the report of proceedings is submitted promptly.

Members, including the president, consider all evidence gathered during an investigation. After consideration of the evidence, they vote in closed session and make appropriate findings and recommendations.

A respondent and his counsel defend against any adverse matters presented during board proceedings.

The person with the greatest number of specifically assigned duties is the recorder. Before a hearing, he does the things necessary so that a prompt, full, and systematic presentation of

the case is possible. To do this, he secures appropriate physical resources (room, paper, etc.), evidence, and witnesses; provides notice to appropriate parties; and, if required, arranges for a reporter and an interpreter. Subject to security requirements, a recorder arranges for the furnishing to and the use of evidence by the board and the respondent.

At a reasonable time prior to the hearing, the recorder gives notice of the hearing to witnesses, members, and the respondent. This notice must include the date, time, and location of the hearing. Oral notice is sufficient for all parties except the respondent, who is entitled to written notice. Also, the respondent may be entitled to a specific minimum amount of notice.

During the hearing, a recorder executes any order of the board. At the initial session, he reads and enters the Memorandum of Appointment into the record. At each session, he notes for the record the presence or absence of the members, the respondent, and respondent's counsel, if any. The recorder keeps or supervises the taking of a record of proceedings. The recorder also presents evidence and examines witnesses for the board in a manner similar to that of trial counsel in a court-martial. The recorder may make an opening argument before evidence is submitted to the board and a closing argument after all evidence has been submitted by both sides.

Although the duties of the recorder during a board proceeding are extensive, your SJA office will normally have a script or checklist to enable the recorder to present the case properly.

After the board's proceedings are completed, the recorder either prepares or supervises the preparation of the record of proceedings and arranges for the authentication of the completed report. The completed report is authenticated when it is read and signed by all members of the board who are available at the time.

ANSWER THE FOLLOWING QUESTIONS:

1. Who is a board's presiding officer?
2. Who presents the evidence for the government?

ANSWERS:

1. President.
2. Recorder.

SECTION B
RULES GOVERNING BOARDS OF OFFICERS

Respondent's General Rights

(AR 15-6, paras. 1-4, 3-5, 3-7c(5), 5-4, 5-6, 5-8, 5-10)

A respondent is entitled to certain procedural rights, which include the right to a hearing, the right to adequate prior notice, and the right to counsel. You should remember that this section deals with general regulatory provisions for boards of officers. Other regulations may specify additional rights depending upon the matter under investigation.

A respondent is entitled to written notice and to be given a reasonable time to prepare for the hearing. The recorder is responsible for providing this notice. This notice may be either personally delivered by the recorder, sent by messenger, or mailed. At a minimum, the notice must state the date, hour, and location of the hearing; the specific matter to be investigated; the respondent's rights with regard to counsel; the names and addresses of the government's witnesses; the fact that the recorder will endeavor to arrange for the presence of any available witnesses desired by the respondent upon timely written request; and the respondent's rights to be present, to present evidence, and to call witnesses.

A respondent, either a soldier or an Army civilian employee, is entitled to representation by counsel. If the soldier or Army civilian employee has not hired a private attorney at his own expense, he is entitled to be represented by a military counsel designated by the appointing authority. A respondent who declines

the services of designated counsel is not entitled to have a different military counsel appointed.

A civilian employee who is a member of a collective bargaining unit has an additional right. Whenever the employee is a respondent or witness at a military proceeding and reasonably believes the inquiry could lead to disciplinary action against him, he is entitled to request and have present the exclusive representative of his collective bargaining unit.

Unless specified by the directive under which the board is appointed, counsel need not be a lawyer.

A government civilian employee may voluntarily act as counsel for another civilian employee or a military member. These services must be gratuitous, while on leave, or after normal hours of employment; and they must not conflict with regular duties.

Proceedings of an investigation or board are normally open to the public only when there is a respondent. In any case, the appointing authority may specify whether the proceedings will be open or closed. See AR 15-6, para. 3-5, for further guidance.

Except for good cause shown on the record, a respondent and his counsel may be present at all open sessions and may cross-examine adverse witnesses.

A respondent may testify in his own behalf. If he is suspected of an offense punishable by court-martial, he cannot be interrogated or requested to make any statement without first being informed of the nature of the offense of which he is suspected and the fact that any statement made by him may be used as evidence against him in a trial by court-martial. This warning is required by Article 31, Uniform Code of Military Justice. The respondent may also elect to remain silent, and no adverse inference can be drawn from his failure to testify.

After all evidence is received, the investigating officer or board members consider it in closed deliberations and arrive at their findings and recommendations.

ANSWER THE FOLLOWING QUESTIONS:

1. Notice of the hearing to a respondent must be in _____.
2. The _____ is responsible for providing the respondent with proper notice.
3. Civilian counsel [is] [is not] provided to a respondent at government expense.
4. A respondent's appointed counsel [must] [usually need not] be a lawyer.
5. Any respondent who is either a _____ or an _____ is entitled to appointed counsel in a board proceeding.

ANSWERS:

1. Notice of the hearing to a respondent must be in writing.
2. The recorder is responsible for providing the respondent with proper notice.
3. Civilian counsel is not provided to a respondent at government expense.
4. A respondent's appointed counsel usually need not be a lawyer. Lawyers need only be appointed when the directive under which the board is appointed so requires.
5. Any respondent who is either a soldier or an Army civilian employee is entitled to appointed counsel in a board proceeding.

**SECTION C
EVIDENCE PRESENTATION**

**Part 1. Witnesses
(AR 15-6, paras. 3-1, 3-6, 3-7, 4-2)**

Investigating officers and boards generally do not have subpoena power over civilian witnesses. A civilian who agrees to appear voluntarily may be issued invitational travel orders that entitle the witness to be reimbursed for expenses. Soldiers and government employees may be ordered (subject to rules against self-incrimination) to testify by their commander or supervisor.

An informal investigation or board may use whatever method it finds most efficient and effective to acquire relevant information. A board may divide witnesses, issues, or evidentiary aspects of the inquiry among the members for individual investigation and development and hold no collective meeting until ready to review all the information collected to determine its completeness. Relevant information may be obtained by personal

interview, correspondence, telephone inquiry, or other informal means.

In formal boards of officers, the government and respondent are entitled to call witnesses to testify under oath at a hearing. Either the president or recorder may administer the oath. Although direct evidence is preferable, evidence in the form of medical records, counseling statements, police reports, and other records may be considered, even if the preparer is available to testify. Nonetheless, given the preference for direct evidence, if a requested witness is reasonably available, he should generally be produced. When a witness, subject to military control, is material to a case, his commander generally determines his availability.

When a board is convened under a directive other than AR 15-6, that directive should also be reviewed to determine whether it contains different rules on the introduction of evidence and proof of facts.

A military witness or military respondent will not be compelled to incriminate himself, to answer any question the answer to which could incriminate him, or to make a statement or produce evidence that is not material to the issue and that might tend to degrade him. A witness or respondent who is not subject to the UCMJ will not be required to make a statement or produce evidence that would deprive him of his right against self-incrimination under the fifth amendment of the U.S. Constitution.

If it appears appropriate and advisable, a board must explain to a witness his right against self-incrimination. If a witness declines to answer a question on these grounds, the witness must specifically state that his refusal is based upon these grounds. The investigating officer or board will decide, after consultation with the legal advisor or, if none, the servicing JA (unless impracticable to do so), whether the reason for refusal is well taken. If it is not, a witness who is subject to military authority may be ordered to answer.

ANSWER THE FOLLOWING QUESTIONS:

1. True/False. Witnesses testifying in a board proceeding can be required to incriminate themselves if necessary to the fact-finding mission of the board.
2. True/False. CPT Johnson testified before a board investigating supply shortages in his unit. As a result of his testimony, he was designated a respondent. He now wishes to remain silent. The board must, therefore, strike his testimony from the record and not consider it for any purpose.

ANSWERS:

1. False. Witnesses, whether civilian or military, retain their right against self-incrimination.
2. False. Although Johnson can refuse to testify further, his prior testimony may still be considered by the board.

Part 2. Rules of Evidence
(AR 15-6, paras. 3-4, 3-6, 5-1)

Because board proceedings are administrative and not judicial in nature, they need not adhere to the rules of evidence for court proceedings. Subject only to some specific limitations discussed herein, anything (oral or written) that in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence. As discussed above, however, there is a preference for direct testimony. Consequently, when a requested witness is reasonably available, the witness should generally be called.

All evidence will be given such weight as the circumstances warrant. Admissibility is ruled upon finally by the legal advisor, if one is appointed. If a legal advisor is not appointed, admissibility is ruled upon by the president in open session, subject to objection by any member. Upon a member's objection to the president's ruling, admissibility is determined by a majority vote of the voting members present. A tie vote upholds the president's ruling.

Unless agreed to by both the respondent and the recorder, no evidence concerning the results of, taking of, or refusal to take a polygraph (lie detector) test can be received in evidence or considered by a board or investigating officer.

In addition, the following are examples of evidence that is not admissible before a board or investigation: privileged communications (attorney-client; penitent-clergyman; husband-wife), "off-the-record" statements; required statements regarding

disease or injury; involuntary admissions; and bad faith unlawful searches.

A bad faith unlawful search is one known to be illegal by the searcher at the time of the search; for example, a commander who knows there is no probable cause to search a soldier would be engaging in a bad faith unlawful search. Such evidence is acceptable only if it can reasonably be determined by the legal advisor or, if none, by the investigating officer or president, that the evidence would inevitably have been discovered. In all other cases, evidence obtained as a result of any search or inspection may be accepted, even if it has been or would be ruled inadmissible in a criminal proceeding.

ANSWER THE FOLLOWING QUESTIONS:

1. Admissible evidence in a board proceeding includes any oral or written matter (including hearsay) that: _____
_____.
2. List three examples of evidence that is inadmissible in board proceedings.
 - a.
 - b.
 - c.
3. True/False. The president's ruling on admissibility of evidence is subject to objection by other members.
4. True/False. The legal advisor's ruling on admissibility of evidence is subject to objection by the board president.

ANSWERS:

1. Admissible evidence in a board proceeding includes any oral or written matter (including hearsay) that in the minds of reasonable men is relevant and material to the issue.
2.
 - a. Privileged communications.
 - b. Polygraph tests, unless its admission is agreed to by both the respondent and the recorder.
 - c. "Off-the-record" statements.
 - d. Bad faith unlawful searches.
 - e. Required statements regarding disease or injury.
 - f. Involuntary admissions.
3. True.
4. False. The legal advisor's rulings on admissibility are final.

SECTION D

**MISCELLANEOUS MATTERS
(AR 15-6, para. 5-7)**

Part 1. Challenges

The respondent may challenge the legal advisor and any voting member of the board. Only challenges for cause are permitted, and the only basis for such a challenge is a lack of impartiality by the challenged members. No peremptory challenge is permitted.

A challenge should be made as soon as the respondent or his counsel knows that grounds exist. If the board has not yet

convened, the challenge should be presented to the appointing authority for his ruling. If the board is in session, the legal advisor will decide upon the challenge. If a legal advisor has not been appointed or if the legal advisor is challenged, the president will rule upon all challenges. If the president is challenged and a legal advisor has not been appointed, the next senior, unchallenged voting member of the board will decide the challenge.

If a challenge for cause is sustained, the challenged member is excused and the remaining members constitute the board. If, after challenges, additional members are needed to have a legal board, alternate members may be called by the president or additional members may be appointed by the appointing authority. The members added to the board are, of course, subject to challenge for cause.

ANSWER THE FOLLOWING QUESTIONS:

1. State the grounds for challenging a board member for cause.
2. When a board without a legal advisor is in session, who rules upon a challenge for cause?

ANSWERS:

1. A board member may be challenged for cause if it is established that the board member cannot impartially participate in the investigation.
2. The president rules upon a challenge for cause unless he is challenged. In that event, the senior, unchallenged voting member rules upon the challenge.

Part 2. Findings and Recommendations (AR 15-6, Section II, paras. 3-9, 3-12)

A board of officers must first make findings of fact. To the best of its ability, a board of officers must fix dates, places, persons, and events, definitely and accurately. They should answer such questions as: What occurred? When did it occur? How did it occur? Who was involved and what was the extent of their involvement? A board should give exact descriptions and values for any property involved in an investigation. These findings must be based upon the evidence.

A finding is a clear and concise statement of a fact that can be readily deduced from evidence in the record. Unless another directive or an instruction of the appointing authority establishes a different standard, the finding of investigations and boards governed by AR 15-6 must be supported by a greater weight of evidence than supports a contrary conclusion; that is, evidence that, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

In addition to findings, a board makes recommendations. A recommendation must be warranted by the findings and generally covers pecuniary, disciplinary, and corrective phases of the investigated matter.

The types of findings and recommendations required must be clearly stated in the Memorandum of Appointment. These instructions define the outer limits of the board's power.

Unless another directive specifies otherwise, a majority vote of the voting members present determines questions before the board. In the case of a tie, the president's vote is the determination of the board.

Normally, board members will agree on the findings and recommendations. If there is disagreement as to the findings, the recommendations, or both, a minority report may be submitted. Reasons for the minority report must be clearly stated in the report of proceedings.

Part 3. Report of Proceedings
(AR 15-6, paras. 2-2, 3-13 et seq.)

The appointing authority is responsible for making available necessary clerical assistance. The recorder prepares the report of proceedings or supervises its preparation. Employment of civilian contract reporters is allowed only for a formal board and only if authorized by a specific directive under which the board is appointed. A contract reporter will not be employed if a government reporter is available. If the regulation under which a board was appointed does not require a particular form or character of report, the report of proceedings is prepared on DA Form 1574 [Report of Proceedings by Investigating Officer (Board of Officers)]. If a verbatim record of the proceedings is required, the DA Form 1574 will be attached as an enclosure. Reports of board proceedings are normally prepared in duplicate, with an additional copy for each respondent.

Reports of proceedings are authenticated by the recorder's signature and the signature of all board members present at deliberations. If any person cannot authenticate because of death, disability, or absence, or refuses to do so, the reason is stated in the report of proceedings. After authentication, all

copies of the report of proceedings are forwarded to the appointing authority for his final action.

ANSWER THE FOLLOWING QUESTIONS:

1. True/False. A finding is a clear and concise statement of fact that can be readily deduced from evidence in the record.
2. True/False. A finding must be supported by clear and convincing evidence.
3. A recommendation must be warranted by the _____.
4. How are reports of board proceedings authenticated?

ANSWERS:

1. True.
2. False. A finding must be supported by a preponderance of the evidence, that is, a greater weight of evidence than supports a contrary conclusion.
3. A recommendation must be warranted by the findings.
4. Reports of board proceedings are authenticated by the recorder's signature and the signatures of all board members present at deliberations. If any person cannot authenticate because of death, disability, or absence, or refuses to do so, the reason is stated in the report of proceedings.

Part 4. Legal Review

(AR 15-6, para. 2-3)

Appointing authorities must obtain legal review of AR 15-6 investigations that involve serious or complex matters. Examples are incidents resulting in death or serious bodily injury; where the findings and recommendations may result in adverse administrative action; or where the investigation will be relied upon in actions by higher headquarters (change 1, 30 Sep 1996, para. 2-3b). Additionally, other directives may require legal review. For example, AR 635-200, para. 2-6, directs that all separation actions in which limited use evidence was introduced, all separation actions containing a recommendation that the respondent receive an other than honorable discharge, and all separation actions in which the respondent identifies specific legal issues for consideration by the separation authority be reviewed by a judge advocate.

Legal review under AR 15-6 will address the following issues (remember, when the investigation was initiated under a specific directive, if that directive provides a standard for legal review, that standard must be followed):

1. Whether the proceedings comply with legal requirements.
2. What effects any errors would have.
3. Whether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority.
4. Whether the recommendations are consistent with the findings.

Part 5. Appointing Authority Actions
(AR 15-6, paras. 2-3, 3-19)

Unless otherwise provided by another directive, the appointing authority is neither bound nor limited by the findings and recommendations of an investigation or board. Therefore, when an investigation or board is conducted solely under the provisions of AR 15-6, the appointing authority may take action that is less favorable than the board or investigating officer recommended.

Additionally, the appointing authority may consider any relevant information in making his decision, to include adverse information that was not considered by the board.

The appointing authority may also direct the investigating officer to conduct additional investigation or to make additional findings or recommendations.

As discussed, the appointing authority's discretion to take any of these additional actions may be limited when the investigation has been appointed pursuant to some directive other than AR 15-6.

TEST

Answer the following true/false questions by circling either T for true or F for false, as appropriate. A statement that is partially false should be treated as completely false.

- | | | | |
|---|---|-----|---|
| T | F | 1. | All board members are entitled to vote. |
| T | F | 2. | A board president is its senior voting member. |
| T | F | 3. | A civilian employee who is a member of a collective bargaining unit may, under some circumstances, be entitled to have the exclusive bargaining representative present when he either testifies as a witness or has been designated a respondent. |
| T | F | 4. | A soldier may be added as a respondent to board proceedings when matters prejudicial to his pecuniary responsibility arise and become an issue during an investigation by a board of officers. |
| T | F | 5. | Witnesses can be compelled to incriminate themselves when doing so will aid a respondent. |
| T | F | 6. | The only type of evidence admissible in a board hearing is sworn testimony. |
| T | F | 7. | A recorder is subject to challenge. |
| T | F | 8. | Recommendations are findings of fact. |
| T | F | 9. | A legal advisor must be appointed to a board any time a respondent is designated. |
| T | F | 10. | A board may consist of one officer. |
| T | F | 11. | As a general rule, all board members must be senior in rank to the respondent. |

- T F 12. A recorder presents evidence and examines witnesses for the board in a manner similar to that of a trial counsel in a court-martial.
- T F 13. The respondent is entitled to oral notice given a reasonable time before the hearing.
- T F 14. Appointed counsel must be a lawyer.
- T F 15. All AR 15-6 investigations must be reviewed for legal sufficiency.
- T F 16. Findings must be supported by a greater weight of evidence than supports a contrary conclusion.
- T F 17. A respondent is entitled to reject designated counsel and demand appointment of counsel of his choosing.
- T F 18. When an AR 15-6 investigation provides the evidence for an adverse Officer Evaluation Report, the investigation must first be referred to the individual concerned.
- T F 19. The president rules finally on admissibility of evidence unless a legal advisor is appointed.
- T F 20. A challenge for cause is appropriate when it appears clearly that a board member cannot impartially participate in an investigation.
- T F 21. Evidence of an otherwise privileged communication is admissible.
- T F 22. The appointing authority is generally bound by the recommendations of a board of officers appointed under the provisions of AR 15-6.

- T F 23. Reports of proceedings are authenticated by the recorder's signature and the signatures of all board members present at deliberations unless a member is absent for good cause shown on the record or refuses to sign.
- T F 24. The appointing memorandum specifies the matter for investigation and scope of required findings and cites any applicable regulations.
- T F 25. The primary function of a board is to protect the rights of a respondent.

TEST ANSWERS

1. False. A nonvoting recorder may be assigned to the board.
2. True.
3. True.
4. True.
5. False. Witnesses cannot be compelled to incriminate themselves or to answer questions that tend to incriminate them.
6. False. Both oral and written matter (including hearsay) is admissible.
7. False. Only voting members and the legal advisor may be challenged.
8. False. A finding is a clear concise statement of fact evidenced in the record or is a conclusion of the board which can be readily deduced from the evidence.
9. False. Formal appointment of a legal advisor is at the discretion of the appointing authority.
10. True.
11. True.
12. True.
13. False. Oral notice is sufficient for all parties except the respondent, who is entitled to written notice.

14. False. Unless required by the specific regulation or statute under which the board is appointed, appointed counsel is not required to be a lawyer.
15. False. AR 15-6 does not require that all investigations conducted under its provisions receive legal review. Review is required for serious or complex cases. Other specific directives may also require legal review.
16. True.
17. False. A respondent who declines the services of a qualified designated counsel is not entitled to have a different counsel designated.
18. False. The investigation need only be referred for comment when the proposed adverse action does not include independent procedural safeguards. The procedures for issuing an adverse OER contain such safeguards.
19. False. Admissibility is ruled upon by the president in open session subject to objection by any member. Upon a member's objection to the president's ruling, admissibility is determined by a majority vote of the members.
20. True.
21. False. Evidence of privileged communications is not admissible.
22. False. Unless otherwise provided by another directive, the appointing authority is neither bound nor limited by the findings and recommendations of an investigation or board.
23. True.
24. True.

25. False. The primary function of a board is to ascertain facts and report them to its appointing authority for his action.